IN THE

Supreme Court of the United States

October Term, 1975.

No. **75-934**

GERALDINE L. FLANAGAN, individually and as heir of CLAIRE LUX, deceased, and on behalf of the heirs and next of kin of the passengers who died in the DC-10 Paris air crash of March 3, 1974, *et al.*,
Petitioner,

v.

McDONNELL DOUGLAS CORPORATION and the UNITED STATES OF AMERICA,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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December 15, 1975

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No.

GERALDINE L. FLANAGAN, Individually and as Heir of Claire Lux, Deceased, and on Behalf of the Heirs and Next of Kin of the Passengers who died in the DC-10 Paris Air Crash of March 3, 1974, *et al.*,

Petitioner,

v.

McDONNELL DOUGLAS CORPORATION and THE UNITED STATES OF AMERICA,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The Petitioner, Geraldine L. Flanagan, *et al.*, individually and on behalf of the heirs and next of kin of all of the passengers who died in the crash of the Turkish Airlines, Inc. DC-10 airplane near Paris, France on March 3, 1974 respectfully pray that a writ of certiorari issue to review the writ of mandamus and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on May 28, 1975.

Opinions Below.

The Writ of Mandamus and Opinion of the Court of Appeals for the Ninth Circuit dated May 28, 1975, the Order of the Court of Appeals dated October 10, 1975, denying

Petitioner's suggestion for a rehearing *en banc*, not yet officially published, and the Order of the District Court for the Central District of California dated August 6, 1974 appear in the Appendix hereto.

Jurisdiction.

The Writ of Mandamus and Opinion of the Court of Appeals for the Ninth Circuit was entered on May 28, 1975. A timely petition for rehearing *en banc* was denied on October 10, 1975 and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Questions Presented.

1. Whether a class action may be maintained under Rule 23 of the Federal Rules of Civil Procedure to obtain a declaration of the liability of defendants for compensatory damages and to recover punitive damages as a result of an airplane disaster in which 335 passengers were killed.

2. Whether a district court's determination that an action may be maintained as a class action under Rule 23 of the Federal Rules of Civil Procedure is properly reviewable in mandamus proceedings in lieu of appeal.

Statutory Provisions and Rules Involved.

28 U.S.C. §1291

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

28 U.S.C. §1292(b)

> "When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."

28 U.S.C. §1651(a)

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

Rule 23 of the Federal Rules of Civil Procedure

> "(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
>
> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites

of subdivision (a) are satisfied and in addition: (1) the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Actions to be maintained; Notice; Judgment; Actions Conducted Partially as Class Actions. (1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits. (2) In any class action maintained under subdivision (b)(3), the court

shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel. (3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class. (4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action;

(3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."

Statement of the Case.

On March 3, 1974 a DC-10 airplane owned by Turkish Airlines, Inc., manufactured by McDonnell Douglas Corporation and General Dynamics Corporation and certified as "airworthy" by the Federal Aviation Administration of the United States, crashed near Paris, France shortly after take-off killing all 346 people aboard the airplane.

The crash occurred when the floor of the passenger compartment on the wide-bodied jet collapsed, completely severing the cables which controlled the plane, following the in-flight opening of the aft cargo door which resulted in explosive decompression in the cargo hold beneath the passenger floor.

On March 28, 1974 Geraldine L. Flanagan, *et al.*, individually, as heirs of their decedents and on behalf of all of the heirs and next of kin of fare-paying passengers aboard the subject DC-10 airplane filed a complaint in the United States District Court for the Central District of California naming McDonnell Douglas Corporation and the United States of America as defendants (A19).

The original complaint herein sought a declaration that McDonnell Douglas Corporation and the United States of America were liable for damages to the class on whose behalf the action was commenced. The complaint asserted claims for relief based upon negligence, strict liability and breach of warranty. Furthermore, a claim seeking $33.5 million in punitive damages was lodged against McDonnell Douglas based upon its "malicious, wilful and wanton conduct and reckless disregard of the rights and safety of prospective passengers aboard the DC-10 aircraft." The complaint was subsequently amended to add General Dynamics as a defendant. A separate action was brought against Turkish Airlines, Inc.

Simultaneously with the filing of the original class action complaint, Petitioner filed a motion for a class action determination. Comprehensive briefs were filed and formal oral argument of the class action motion was heard during the entire week of June 3, 1974. In the course of the debate all of the facts to the extent then known were reviewed and the relevant issues of law fully explored. The defendants uniformly denied any culpability.

Issues relating to liability and punitive damages were severed from issues of compensatory damages by order of the District Court, July 16, 1974.

The Judicial Panel for Multidistrict Litigation transferred all actions pending arising out of the March 3, 1974 air disaster to the District Court in which the *Flanagan* class action had been brought, Central District of California (Hon. Peirson M. Hall) by order dated June 6, 1974. *In re Air Crash Disaster at Paris, France, on March 3, 1974,* No. 172, 376 F. Supp. 887 (Judicial Panel on MDL 1974).

On August 6, 1974 the District Court filed its Order in which it determined on the basis of the allegations stated in the complaint and the additional facts made known to the Court in the course of the argument that the action met the requirements of Rule 23(a) of the Federal Rules of Civil Procedure and that the class action could be maintained under Rules 23(b)(1)(A), 23(b)(1)(B) and 23(b)(2) on liability issues and the potential issue of punitive damages (A11).

Respondents' motions for leave to appeal pursuant to 28 U.S.C. 1292(b) were denied. Respondents thereupon filed notices of appeal from the District Court's August 6, 1974 Order and applied to the Court of Appeals for the Ninth Circuit for a Writ of Mandamus or Prohibition under 28 U.S.C. §1651(a), the intent of which was to obtain review of and vacate the class action order of August 6, 1974.

Petitioner moved to dismiss the appeal and opposed the granting of the Writ of Mandamus or Prohibition on the grounds that the District Court's August 6, 1974 class action order was not "appealable" under 28 U.S.C. §1291, that mandamus or prohibition proceedings may not be substituted for appeal and that in any event all of the requirements of Rule 23 had been met.

The Court of Appeals nevertheless issued a Writ of Mandamus or Prohibition on May 28, 1975 (28 U.S.C. §1651) and therein vacated the class action determination of the District Court (A1). Respondents' appeals of the District Court's order were held to be moot. Petitioner's timely application for a rehearing *en banc* was rejected on October 10, 1975 (A8).

REASONS FOR GRANTING THE WRIT.

The decision below raises serious, significant and recurring questions about the application and interpretation of Rule 23 of the Federal Rules of Civil Procedure and the manner in which class action orders may be reviewed by appellate courts.

1. Uncertainty exists in determining whether class actions may be maintained under Rule 23 in cases arising out of mass disasters, such as commercial aviation accidents.

The court below stated that the maintenance of a class action to obtain a declaration of defendants' liability and to recover punitive damages is "inconsistent with any tenable interpretation of Rule 23". This interpretation of Rule 23 conflicts with the clear and straightforward language of the Rule, with decisions in the Ninth Circuit and other jurisdictions and with the liberal interpretation intended for Rule 23.

The need for the resolution of these conflicts in interpreting Rule 23 is underscored in the dissent concurred in by three judges below from the denial of Petitioner's application for a rehearing *en banc*. The dissenting opinion said:

> "[T]he issue is of such tremendous importance to the surviving dependents of the victims of air crashes, and the result is one that hurts them, I think we should take it *en banc*" (A10).

This court has recognized that important questions of construction of the Federal Rules of Civil Procedure justify the grant of certiorari. *Beacon Theatres v. Westover*, 359 U. S. 500 (1959); *Eisen v. Carlyle & Jacqueline*, 518 U. S. 1085 (1974).

The decision below disregards the fact that nowhere does Rule 23 explicitly or by implication state that it may not be utilized in mass disaster litigation. Rule 23 requires a District Court to decide whether the particular controversy satisfies the requirements of Rule 23(a) and is maintainable as a class action under any one of the subdivisions of Rule 23(b). This is precisely what the District Court did as its well reasoned and sound order reflects.

The opinion of the court below that a class action under Rule 23 is "inconsistent with any tenable interpretation of Rule 23" is unjustified and unsupported by any appellate court decision.

To the contrary, however, findings that class actions in mass disaster cases are consistent with Rule 23 abound.

In *Hernandez v. Motor Vessels Skywood,* 61 F. R. D. 558 (S. D. Florida 1974), a class action was found to lie under Rule 23(b)(1)(A), 23(b)(1)(B) and 23(b)(3) to establish the liability of a defendant for the food poisoning of 666 passengers on a cruise ship. In *American Trading and Production Corp. v. Fishback and Moore, Inc.,* 47 F. R. D. 155 (N. D. Ill. 1969), a class action was held maintainable to determine the liability of defendants to class members whose property was destroyed by fire. In *Petition of Gabel,* 350 F. Supp. 624 (C. D. CA. 1972), a class action was held maintainable in an aviation accident case in which 66 persons died. Similarly, *Stoddard v. Ling Temco Vought,* Civ. No. 72-1294 ALS (C. D. CA. 1973), held a class action maintainable in an aviation mass disaster situation.

There is disagreement within the Ninth Circuit on the issue of class actions in mass disaster cases. After the district court in *Stoddard* certified the class, defendants

therein sought a writ of mandamus or prohibition in the Court of Appeals. Significantly, the application was summarily denied in an unpublished opinion by a panel of judges different from those whose opinion is being challenged herein. This underscores the error of the court below in *Flanagan* that a class action in mass disaster cases is "inconsistent with any tenable interpretation of Rule 23".

In addition, denial of a class action in *Flanagan* should not have been predicated to any extent upon a finding that the district judge "made a similar error" in *Petition of Gabel,* 350 F. Supp. 624 (C. D. CA. 1972), where *Gabel* is now on appeal. The broad sweep of the condemnation of the court below is prejudicial to both *Flanagan* and *Gabel,* both of which must be decided on their own merits.

Other federal courts have concurred that Rule 23 is applicable to mass disaster cases though the particular facts presented to them failed to meet the Rule 23 prerequisites.

In *Causey v. Pan American World Airways, Inc.,* 66 F. R. D. 392 (E. D. Va. 1975), a class action was instituted as a result of the deaths of 95 persons in an air crash. The district court in denying the motion for class determination said

> "On balance, it is the court's views that under some circumstances mass accident litigation may and properly ought to be maintained as a class action."

Accord, *Hobbs v. Northeast Airlines,* 50 F. R. D. 76 (E. D. Pa. 1970); *Daye v. Commonwealth of Pennsylvania,* 344 F. Supp. 1337 (1972).

Several leading authorities also have, in fact, agreed that class action treatment is suitable in some mass disaster cases such as airplane crashes.

> "[A] mass accident appears peculiarly appropriate for class treatment. Indeed the question of liability to all those injured in a plane or train crash is more likely to be uniform than that of liability for a manipulation of the price of security; with the introduction of such large vast scale public transportation facilities as the 'jumbo jets', the ability to determine liability for an accident in one proceeding will be even more desirable." Vol. 3B, J. Moore, *Federal Practice* §23.45(3) at 23-811 N. 35 2nd Edition 1974.

See also 7A C. Wright and A. Miller, Federal Practice and Procedure: Civil Section 1783 at 117 (1972).

A contrary view is expressed in *Pallas v. Trans-World Airlines, Inc.,* F. Supp. (S. D. N. Y. 1975), not yet officially reported, 75 Civ. 209 decided June 3, 1975.

The instant case clearly demonstrates that an action to establish the liability of defendants to the survivors of the victims of a major commercial air crash can satisfy the prerequisites of Rule 23.

The court below apparently agreed that the requirements of Rule 23(a) were satisfied since its opinion considered only the applicability of Rule 23(b).

Rule 23(a)(1) was satisfied by a showing that the heirs and next of kin of the 346 persons aboard the Turkish Airlines DC-10 are "so numerous that joinder of all members is impracticable". Since the March 3, 1974 air disaster occurred as a consequence of a single set of facts common to all the victims the requirement of Rule 23(a)(2) that "there are questions of law or fact common

to the class" was satisfied. It follows that "the claims or defenses of the representative parties are typical of the claims or defenses of the class" on the issues of liability and punitive damages. The district court further found that "the representative parties will fairly and adequately protect the interest of the class" as required by Rule 23(a)(4).

The District Court went on to hold that a class action herein was maintainable under Rule 23(b)(1)(A), 23(b)(1)(B) and 23(b)(2). It could also have ruled that the action was maintainable under Rule 23(b)(3) in that the class action standards under 23(b)(1)(A) and (B) and (b)(2) are stricter than under (b)(3) and that a class action is effectively "superior to other available methods for the fair and efficient adjudication of the controversy." Rule 23(b)(3).

As required by Rule 23(b)(1)(A) the District Court found that "the prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct" for the defendants.

The potential for inconsistent or "varying adjudications" in aviation mass disaster cases is demonstrated by two recent decisions, *Day v. Trans World Airways, Inc.,* 393 F. Supp. 217 (S. D. N. Y. 1975), and *Evangelinos v. Trans World Airways, Inc.,* 396 F. Supp. 95 (W. D. Pa. 1975). In both cases the issue presented was whether defendant is absolutely liable for personal injuries sustained in a terrorist attack at the Athens, Greece airport on August 5, 1973 under the Warsaw Convention, 49 Stat. 3000 *et seq.* as modified by the Montreal Agreement. Though the plaintiffs in both cases suffered injury in the same manner, at the hands of the same terrorists, at

virtually the same instant, in *Day* the Court granted plaintiff's motion for summary judgment while in *Evangelinos* the defendant's motion for summary judgment to dismiss the claim (not just the complaint) was granted.

The District Court, below, further found that the prosecution of separate actions by individual members of the class which "would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests" as required by Rule 23(b)(1)(B).

The district court's Rule 23(b)(2) determination was appropriate in light of the demands for declaratory relief on the liability issues asserted in the class action complaint. The court below ignored this.

We submit a writ of certiorari should be granted to settle whether a class action in a mass disaster case may be maintained under Rule 23.

2. The use of mandamus as a substitute for appeal was improper. It violated both the statutory appellate scheme and the spirit of Rule 23 itself.

By its use of the writ of mandamus to review and then vacate the District Court's class action order the Court of Appeals, below, undermined the principle that the extraordinary remedy of mandamus is reserved for extraordinary causes. *Ex Parte Fahey,* 332 U. S. 258, 260 (1967); *Will v. United States,* 389 U. S. 90 (1967). An "extraordinary cause" justifying mandamus is one in which "[O]therwise the appellate jurisdiction could be defeated and the purpose of the statute authorizing the writ thwarted by unauthorized actions of the District Court obstructing the appeal." *Roche v. Evaporated*

Milk Ass'n, 319 U. S. 21, 25 (1943), and case decided therein. Mandamus is not a substitute for appeal. *Will v. United States,* 389 U. S. 90, 97.

Even the alleged "clear abuse of discretion" with which the court below charged the District Court is not a basis for issuance of a writ of mandamus. *De Beers Consolidated Mines v. United States,* 325 U. S. 212, 217 (1945); *Roche v. Evaporated Milk Ass'n, supra.*

In any event, "[W]here as here the statutory scheme permits appellate review of interlocutory orders only on appeal from the final judgment, review by certiorari or other extraordinary writ is not permissible in the face of the plain indication of the legislative purpose to avoid piecemeal reviews." *U. S. Alkali Export Ass'n v. United States,* 325 U. S. 196, 203 (1945).

First, it is uniformly held that class action determinations are not "final orders" within the meaning of 28 U.S.C. §1291 and are not subject to interlocutory appeal absent certification under 28 U.S.C. §1292(b). *Weight Watchers of Philadelphia v. Weight Watchers Int'l,* 455 F. 2d 770 (2nd Cir. 1972); *Korn v. Franchard Corp.,* 443 F. 2d 1301 (2nd Cir. 1971); *City of New York v. Int'l Pipe & Ceramics Corp.,* 410 F. 2d 295 (2nd Cir. 1970); *Caceres v. Int'l Air Transport Ass'n,* 422 F. 2d 141 (2nd Cir. 1970); *Hackett v. General Host Corp.,* 455 F. 2d 618 (3rd Cir.), cert. denied 407 U. S. 925 (1972); *Graci v. United States,* 472 F. 2d 124 (5th Cir. 1973); *Songy v. Coastal Chemical Corp.,* 469 F. 2d 709 (5th Cir. 1972); *Gosa v. Securities Investment Co.,* 449 F. 2d 1330 (5th Cir. 1971); *Lamarche v. Sunbeam Television Corp.,* 446 F. 2d 880 (5th Cir. 1971); *Walsh v. City of Detroit,* 412 F. 2d 226 (6th Cir. 1969); *Falk v. Dempsey Tegeler & Co., Inc.,* 472 F. 2d 142 (9th Cir. 1972); *Weingartner v. Union Oil Company of California,* 431 F. 2d 26 (9th Cir. 1970), cert.

denied 400 U. S. 1000 (1971); *Katz v. Carte Blanche Corp.*, 52 F. R. D. 510 (W. D. Pa. 1971), and *Kohn v. Royall, Koegell & Wells,* 496 F. 2d 1094 (2nd Cir. 1974).

The only limited exception to the established principle of the non-appealability of class action determinations was enunciated in *Eisen v. Carlyle & Jacqueline,* 518 U. S. 1085 (1974), relying upon *Cohen v. Beneficial Industrial Loan Corp.,* 374 U. S. 541 (1949). A "collateral order" in the meaning of *Eisen* is one which raises issues fundamental to the further conduct of the case and where the issue is separable from the merits of the case. No "collateral order" is presented for review in this case. See *Herbst v. Int'l Telephone & Telegraph Co.,* 495 F. 2d 1308 (2nd Cir. 1974).

Second, the fundamental reason for the "non-appealability" of class action determinations is evident in Rule 23 itself. Rule 23(c)(1) provides:

> "An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits."

Rule 23(d) further provides:

> "In the conduct of actions to which this rule applies, the court may make appropriate orders. . . . The orders may be combined with an order under Rule 16 and may be amended or altered as may be desirable from time to time."

The Ninth Circuit even holds to this view at least with respect to class actions other than those in mass disaster cases. It recently said

> "We are clear that a class certification order does not fall within *Cohen.* The finality condition is not met, as such an order is not a final determination of the propriety of a class. Under Fed. R. Civ. P. 23(c)(1), a class must be certified as soon as practicable after commencement of the action, and is made conditional and subject to alteration, to the creation of sub-classes. Rule 23(c)(4)(B), or indeed to decertification as the suit progresses and newly discovered facts warrant. Nor is the class issue separable from the merits in all cases (including this one). The common questions, typicality, conflicts and adequacy of representation, Fed. R. Civ. P. 23(a), and predominance tests, Fed. R. Civ. P. 23(b)(3), are determinations (unlike, for example, the notice question involved in Eisen IV) which may require review of the same facts and the same law presented by review of the merits.
>
> Nor, for that matter, does the order threaten the defendant with any irreparable harm cognizable under *Cohen.* The defendant does not lose any legal rights or entitlement in the interim between certification and appeal—appeal after the litigation fully protects from a judgment for an improper class." *Blackie v. Barrack,* F. 2d (9th Cir. 1975), CCH Trade Cases ¶95,312 p. 98,577, September 25, 1975 not yet officially reported.

The obvious flexibility built into Rule 23 is clearly designed to permit "a determination once made to be altered or amended upon fuller development of the facts if the original determination appears inappropriate." See Advisory Committee Comments, 39 F. R. D. at 104. See also *Walsh v. City of Detroit,* 412 F. 2d 226 (6th Cir. 1969). Allowing a Writ of Mandamus to be used to invade the broad discretionary authority vested in the District Court poses a threat to the "fair and efficient adjudication" of complex multiparty litigation which Rule 23 was intended to enhance.

In issuing the writ of mandamus the Court of Appeals below also placed itself in conflict with the Second Cir-

cuit which in holding a class action order non-appealable also said

> "We do not—indeed may not—issue mandamus with respect to orders issuing from the District Court in their discretion, save in [most] extraordinary circumstances not remotely presented here." *General Motors Corp. v. City of New York*, 501 F. 2d 639 (2nd Circuit 1974).

See also *Donlon Industries, Inc., v. Forte*, 402 F. 2d 935 (2nd Cir. 1968); *Weight Watchers of Philadelphia v. Weight Watchers Int'l*, 455 F. 2d 770 (2nd Cir. 1972); *Interpace Corp. v. City of Philadelphia*, 438 F. 2d 401 (3rd Cir. 1971).

Whether a writ of mandamus may be issued to review and vacate a class action determination which is neither a final order under 28 U.S.C. §1291, certified as appealable under 28 U.S.C. §1292(b) nor a "collateral order" separable from the merits is a question which justifies the grant of certiorari to review the actions of the court below.

Conclusion.

For these reasons a writ of certiorari should issue to review the writ of mandamus and opinion of the Ninth Circuit.

Respectfully submitted,

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Counsel for Petitioner

December 15, 1975

APPENDIX.

Opinion of the United States Court of Appeals, Ninth Circuit, May 28, 1975.

UNITED STATES COURT OF APPEALS,

FOR THE NINTH CIRCUIT.

MCDONNELL DOUGLAS CORPORATION,

Petitioner,

vs.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,

Respondent,

GERALDINE L. FLANAGAN, *et al.*,

Real Parties in Interest.

No. 74-2639

UNITED STATES OF AMERICA,

Petitioner,

vs.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,

Respondent,

GERALDINE L. FLANAGAN, *et al.*,

Real Parties in Interest.

No. 74-2679

Opinion of the United States Court of Appeals, Ninth Circuit, May 28, 1975

GERALDINE L. FLANAGAN, *et al.*,

Plaintiffs-Appellees,

vs.

McDONNELL DOUGLAS CORPORATION,

Defendant-Appellant.

No. 74-2663

GERALDINE L. FLANAGAN, *et al.*,

Plaintiffs-Appellees,

vs.

UNITED STATES OF AMERICA,

Defendant-Appellant.

No. 74-2918

Petitions for Writs of Mandamus or Prohibtion and Appeals from the United States District Court for the Central District of California

Before:

Hufstedler and Wallace, Circuit Judges,
and Schnacke,* District Judge

WALLACE, Circuit Judge:

Flanagan v. McDonnell Douglas Corporation arises out of the crash of a DC-10 airplane near Paris, France. The

*Honorable Robert H. Schnacke, United States District Judge, Northern District of California, sitting by designation.

Opinion of the United States Court of Appeals, Ninth Circuit, May 28, 1975

named plaintiffs are next of kin of five of the 335 passengers who died in the crash. They brought this action for wrongful death against the McDonnell Douglas Corporation (McDonnell Douglas) and the United States, seeking compensatory and punitive damages and a declaration of defendants' liability. They also seek relief on behalf of all next of kin of passengers who died in the crash.

We have already considered an earlier order made by the district court in this litigation. In our consolidated opinion in *Pan American World Airways, Inc. v. United States District Court,* F. 2d (9th Cir.), we held that the district court could not send notice to unnamed potential plaintiffs "unless and until the particular action involved is properly certified as a class action." *Id.* at . While this prior case was pending on appeal, the district court certified *Flanagan* as a class action under subdivisions (b)(1)(A), (b)(1)(B) and (b)(2) of Rule 23 of the Federal Rules of Civil Procedure. McDonnell Douglas has filed a petition for mandamus to vacate this certification and to strike the class action allegations of the complaint.. (No. 74-2639.) It has also sought to appeal from the certification. (No. 74-2663.) The government has done the same. (Nos. 74-2679, 74-2918.) We grant the petitions for mandamus insofar as they seek to vacate the class action certification. We dismiss the appeals as moot.

The district court found that a class action could be maintained under each of subdivisions (b)(1)(A), (b)(1)(B) and (b)(2) of Rule 23. None of these subdivisions permit certifications of a class whose members have independent tort claims arising out of the same occurrence and whose representatives assert only liability for damages. *La Mar v. H & B Novelty & Loan Co.,* 489 F. 2d 461, 465-67 (9th Cir. 1973). We reject the contrary holdings in *Hernandez v. Motor Vessel Skyward,* 61 F.R.D.

558 (S.D. Fla. 1973), and *Petition of Gabel,* 350 F. Supp. 624 (C.D. Cal. 1972), because they are inconsistent with our holding in *La Mar* and for other reasons which follow.

Subdivision (b)(1)(A) authorizes a class action when separate actions would create a risk of varying adjudications "which would establish incompatible standards of conduct for the party opposing the class." Fed. R. Civ. P. 23(b)(1)(A). The district court found this requirement was met in this case because if separate actions were maintained, defendants might be held liable in some actions but not in others. This conclusion is untenable. Admittedly, separate actions could reach inconsistent results and inconsistent resolutions of the same question of law might establish "incompatible standards of conduct" in the sense of different legal rules governing the same conduct. But subdivision (b)(1)(A) was not intended to permit class actions simply when separate actions would raise the same question of law. To hold otherwise would be to render superfluous the detailed provisions of subdivision (b)(3). Although the two subdivisions do not present mutually exclusive tests, neither does one entirely displace the other. We cannot read subdivision (b)(1)(A) so broadly that subdivision (b)(3) applies only to class actions already maintainable under subdivision (b)(1)(A).

Instead, the "incompatible standards of conduct" of subdivision (b)(1)(A) must be interpreted to be incompatible standards of conduct required of the defendant in fulfilling judgments in separate actions. See *La Mar, supra,* 489 F. 2d at 466. In this case, a judgment that defendants were liable to one plaintiff would not require action inconsistent with a judgment that they were not liable to another plaintiff. By paying the first judgment, defendants could act consistently with both judgments. The declaratory relief sought by plaintiffs does

not alter this conclusion. They seek only a declaration of liability. They have not specified, and we cannot discern, what obligations such a declaration would impose upon defendants that a judgment for damages would not.

Subdivision (b)(1)(B) permits class actions where individual actions might "as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests." Fed. R. Civ. P. 23(b)(1)(B). The district court found this requirement to have been met because of the complexity and expense of the litigation and the burdens upon defendants of multiple trials. This ruling is inconsistent with our holding in *La Mar* that class actions are permitted under subdivision (b)(1)(B) only if separate actions "inescapably will alter the substance of the rights of others having similar claims." *La Mar v. H & B Novelty & Loan Co., supra,* 489 F. 2d at 466-67. At worst, individual actions would leave unnamed members of the class with the same complexity and expense as if no prior actions had been brought. As for the rights of defendants, subdivision (b)(1)(B) is concerned only with the rights of unnamed class members, not with the rights of parties opposing the class. *Id.* at 466-67.

Subdivision (b)(2) authorizes class actions where

> the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole • • •

Fed. R. Civ. P. 23(b)(2). The district court found the required inaction of defendants in the government's refusal to process claims filed with the FAA and in both defendants' opposition to notifying non-party potential

plaintiffs of the actions before the court. Neither of these omissions is sufficient. We have already held that the district court could not issue notice to unnamed potential plaintiffs without first properly declaring a class action. *Pan American World Airways, Inc. v. United States District Court, supra,* F. 2d at . The district court cannot circumvent this holding by finding opposition to notice to be sufficient grounds for a class action. The government's refusal to process claims filed with the FAA only represents a refusal to admit liability. A denial of liability, even to multiple plaintiffs, cannot form the basis for a class action. But wholly apart from these reasons, subdivision (b)(2) by its own terms does not apply to actions only for damages. Fed. R. Civ. P. 23(b)(2); *La Mar, supra,* 489 F. 2d at 466. As we have already pointed out, the declaratory relief sought by plaintiffs adds nothing to their claim for damages.

Despite the district court's erroneous certification of a class action, respondents (who were the plaintiffs below) contend that this case does not present the extraordinary circumstances necessary for issuance of mandamus. We disagree. While erroneous class action certifications may rarely be corrected by mandamus, *General Motors Corp. v. City of New York,* 501 F. 2d 639, 648 (2d Cir. 1974); *Interpace Corp. v. City of Philadelphia,* 438 F. 2d 401, 403-4 (3rd Cir. 1971), the certification in this case constitutes a clear abuse of discretion sufficient to invoke this extraordinary writ, *La Buy v. Howes Leather Co.,* 352 U. S. 249, 257 (1957); *Bankers Life & Cas. Co. v. Holland,* 346 U. S. 379, 382-83 (1953). Not only is the district court's decision contrary to our holding in *La Mar,* it is also inconsistent with any tenable interpretation of Rule 23. We are also aware that the district court has reached an identical decision in a prior case. *Petition of Gabel,* 350 F. Supp. 624, 630 (C.D. Cal. 1972). Repeated errors of this magnitude in applying the Federal Rules of Civil Procedure may be corrected by mandamus. *La Buy v. Howes Leather Co., supra,* 352 U. S. at 255-60; *Will v. United States,* 389 U. S. 90, 95-96, 99-107 (1967); see *Schlagenhauf v. Holder,* 379 U. S. 104, 109-12 (1964).

A writ of mandamus shall issue ordering the district court to vacate its certification of a class action under Rule 23(b)(1)(A), (b)(1)(B) and (b)(2) of the Federal Rules of Civil Procedure. The appeals shall be dismissed as moot.

It Is So Ordered.

Judge Schnacke concurs in the result.

Filed
May 28, 1975
E. Melfi, Clerk
U. S. Court of Appeals

Opinion of the United States Court of Appeals, Ninth Circuit, on Petition for Rehearing *en banc*, October 10, 1975.

UNITED STATES COURT OF APPEALS,

FOR THE NINTH CIRCUIT.

MCDONNELL DOUGLAS CORPORATION,
Petitioner,

vs.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,
Respondent,

GERALDINE L. FLANAGAN, *et al.*,
Real Parties in Interest.

No. 74-2639

UNITED STATES OF AMERICA,
Petitioner,

vs.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,
Respondent,

GERALDINE L. FLANAGAN, *et al.*,
Real Parties in Interest.

No. 74-2679

Opinion of the United States Court of Appeals, Ninth Circuit, on Petition for Rehearing en banc, October 10, 1975

GERALDINE L. FLANAGAN, *et al.*,
Plaintiffs-Appellees,

vs.

MCDONNELL DOUGLAS CORPORATION,
Defendant-Appellant.

No. 74-2663

GERALDINE L. FLANAGAN, *et al.*,
Plaintiffs-Appellees,

vs.

UNITED STATES OF AMERICA,
Defendant-Appellant.

No. 74-2918

MCDONNELL DOUGLAS CORPORATION,
Petitioner,

vs.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,
Respondent,

GERALDINE L. FLANAGAN, *et al.*,
Real Parties in Interest.

No. 74-2093

Opinion of the United States Court of Appeals, Ninth Circuit, on Petition for Rehearing en banc, October 10, 1975

[October 10, 1975]

Before:

Hufstedler and Wallace, Circuit Judges, and Schnacke,* District Judge.

The full court has been advised of the suggestion for an *en banc* hearing. An active judge called for an *en banc* vote and a majority of the judges of the court has voted to reject the suggestion for rehearing *en banc*. Fed. R. App. P. 35(b).

Judge Ely did not participate in the consideration or disposition of the suggestion for *en banc* rehearing.

The suggestion for rehearing *en banc* is rejected.

Chambers, Wright and Kennedy, Circuit Judges, dissenting from the refusal to rehear *en banc*.

We cannot say the decision in this case is contrary to prior decisions of this Court.

But the issue is of tremendous importance to the surviving dependents of the victims of air crashes, and the result is one that hurts them. I think we should take it *en banc*.

It will be interesting to have figures in the months to come on how the decision slows down speedy dispositions.

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*Honorable Robert H. Schnacke, United States District Judge, Northern District of California, sitting by designation.

First Amended Order Granting Class Action Determination, Defining the Class, and Designating Counsel to the Class, August 6, 1974.

LIABILITY AND DAMAGES (with corrections and additions by the Court)

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Filed
Aug 6, 1974
Clerk, U. S. District Court,
Central District of California
By: AR Deputy

First Amended Order Granting Class Action Determination, Defining the Class, and Designating Counsel to the Class, August 6, 1974

UNITED STATES DISTRICT COURT,

CENTRAL DISTRICT OF CALIFORNIA.

In re:

PARIS AIR CRASH of March 3, 1974

GERALDINE L. FLANAGAN, Individually, and as heir of Claire Lux, deceased, *et al.*,

Plaintiffs,

against

McDONNELL DOUGLAS CORPORATION and UNITED STATES OF AMERICA,

Defendants.

M. D. L. 172
Civil Action No. 74-808-PH

The plaintiffs, Flanagan and Wilcox, *et al.*, having filed the *Flanagan* action, Civil no. 74-808-PH, as a class action under Rule 23 of the Federal Rules of Civil Procedure and having moved this Court for an Order that the action should be maintained as a class action, and that the class should be defined; and

the defendants, McDonnell-Douglas Corporation and United States of America, having submitted extensive papers in opposition to said motion; and

plaintiffs' counsel in other cases arising out of this accident having submitted papers in opposition to said motion; and

extensive oral argument having been heard on said motion with Lee S. Kreindler, Wm. Marshall Morgan, and

First Amended Order Granting Class Action Determination, Defining the Class, and Designating Counsel to the Class, August 6, 1974

Marc S. Moller arguing in support of said motion; and Robert C. Packard, James C. Fitzsimons, and John G. Laughlin arguing, on behalf of defendants in opposition to said motion; and

Gerald C. Sterns, Donald W. Madole, Daniel C. Cathcart and Richard F. Krutch on behalf of other plaintiffs, arguing in opposition to said motion; and

the Court having previously designated a committee of plaintiffs' counsel with responsibility for representing all claimants on issues of liability;

the following appears to the Court:

(1). The class is so numerous that joinder of all members is impracticable, in that the class consists of multiple heirs, beneficiaries, and personal representatives of the approximately 335 passengers on the Turkish Airlines DC-10 which crashed near Paris, France on March 3, 1974, all of whom were killed in this accident;

(2). There are questions of law or fact common to the class, in that legal and factual questions concerning the liability of the defendants to members of the class as well as the potential issue of punitive damages with respect to the defendant, McDonnell-Douglas, are identical to all members of the class. There was but one crash. There was but one set of operative facts which caused it. The facts concerning the Product Liability of McDonnell-Douglas cannot vary but are the same with respect to all members of the class. The law of Products Liability as between the members of the class and McDonnell-Douglas is the law of California and is the same with respect to all members of the class. With respect to the United States of America under the Federal Tort Claims Act, the Court will look to the law of California and apply the law of California if that is where the alleged acts of omission or commission on the part of government took place,

(3). The claims or defenses of the representative parties are typical of the claims or defenses of the class, in that with respect to the issues of liability, as heretofore stated, the plaintiffs' claims are typical of those of all other members of the class,

(4). The representative parties and the abovesaid plaintiffs' committee on the issues of liability will fairly and adequately protect the interests of the class. Plaintiffs' committee and plaintiffs' counsel in the *Flanagan* action possess the requisite background of knowledge, experience, professional qualifications, and financial resources, as set forth in the Affidavits of Lee S. Kreindler, heretofore filed in support of this motion,

(5). The prosecution of separate actions by individual members of the class without a class action would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the defendants, and particularly the defendant, McDonnell-Douglas Corporation, in that (1) if the claims of the individual members of the class are permitted to be prosecuted separately, it is possible that a particular defendant herein would be found liable for negligence in one action and absolved from liability for negligence in another action, and with particular reference to the plaintiffs' claim for punitive damages, if the Court should find that punitive damages are recoverable under the applicable law, since punitive damages are dependent upon the degree of culpability or standard of conduct of the defendant, separate adjudications could and probably would be inconsistent and thereby establish incompatible standards of conduct,

(6). The prosecution of separate actions by individual members of the class would create a risk of adjudications with respect to individual members of the class which would as a practical matter be dispositive of the in-

terests of the other members not parties to the adjudications, or substantially impair or impede their ability to protect their interests, inasmuch as a judgment in favor of a particular defendant, while it might or might not be binding on members of said class not parties to the litigation, would as a practical matter make it impossible or at least extremely difficult for other members of the class to proceed, because of the complexity and expense of the litigation and the burden on said defendant, its employees and its witnesses, in having to retestify to facts and circumstances established in the initial litigation in which it was exonerated, and

(7). The defendants have acted or refused to act on grounds generally applicable to the class, thereby making appropriate declaratory relief with respect to the class as a whole, inasmuch as (1) the defendant, United States of America, has thus far declined to act on the notices of claim heretofore filed with the Federal Aviation Administration by the plaintiff herein, and both defendants have denied their liability, thereby making appropriate a declaration of liability with respect to them, and (2) the defendants, McDonnell-Douglas Corporation and United States of America, have opposed the due process to the absent members of the class by preventing the sending out of an appropriate notice to members of the class so that said members of the class could either come into this litigation or file a suit in any other court having jurisdiction and be represented in the taking of depositions and other discovery. This opposition by defendants may frustrate the efforts of the Court to proceed, in the interests of justice to a determination of liability at the earliest possible time and protract the giving of a due process notice beyond the period of the applicable statute of limitations. Said members of the class who are not represented by members of the plaintiffs' committee, if they are not properly notified of the pendency

of this litigation and the pending depositions, may have a right, at a later time, to retake such testimony. This resistance to the sending out of a proper notice therefore makes it appropriate that this action be maintained as a class action for purposes of a declaration of the liability of the defendants.

WHEREFORE, the Court orders that:

(1). This action shall be maintained as a class action under Rule 23(b) (1) (A) and (B), and 23(b) (2) and has been such since it was filed.

(2). The class for whose benefit this action is maintained is defined to include all heirs, beneficiaries, and personal representatives of the passengers aboard the aircraft. All cases heretofore or hereafter filed are hereby severed as to liability and damages and consolidated on the issue of liability.

(3). The attorneys for plaintiffs Flanagan and Wilcox, *et al.*, in this action (Civil No. 74-808-PH) to wit, Lee S. Kreindler of the firm of Kreindler and Kreindler in New York City and Wm. Marshall Morgan of the firm of Morgan, Wenzel & McNicholas of Los Angeles, and the firm of Paul, Weiss, Rifkind, Wharton & Garrison of New York, shall act as Counsel to the class.

Counsel for the class shall have such responsibility for those persons now and hereafter represented by members of the Plaintiffs' Committee hereafter identified as he has as a member of such committee.

Counsel to the class shall have the fiduciary responsibility at counsel's expense of sending all notices required by law or order of the court to all members of the class, and shall file a verified return of service of all such notices.

Counsel to the class will represent, on matters of individual compensatory damages all members of the class who have not heretofore retained or do not in the future

retain their own attorneys, as well as those members of the class who are already plaintiffs in the Flanagan-Wilcox action (Civil Action No. 74-808-PH) or who individually retain said attorneys;

(4). The plaintiffs' committee, heretofore designed by the Court, to wit, Liaison Counsel—Wm. Marshall Morgan; Co-lead counsel—James G. Butler, Lee S. Kreindler, and Gerald C. Sterns, and the Discovery Committee of Donald W. Madole, Chairman, Daniel C. Cathcart, Richard S. Krutch and Seymour Madow, shall continue to function and shall be in overall charge of the liability phases of this consolidated litigation.

Members of the said plaintiffs' committee shall continue to maintain full and complete responsibility for the representation of their clients,

(5). The fees of the Counsel to the Class, heretofore designated in this Order, shall be determined by the Court at the conclusion of the litigation or at the time of disposition of particular claims or class members for whom the said class counsel have acted, as class counsel, with respect to the particular claim. The said Counsel to the Class will not receive any fees on cases represented by the respective members of the plaintiffs' committee,

(6). The fees of members of the plaintiffs' Committee, for their work on said committee, which, as heretofore stated, will continue to be in charge of the management of the liability aspects of this litigation, will be determined by the Court at the conclusion of the litigation, and be assessed against the recoveries in all cases except those represented by the respective members of the plaintiffs' Committee,

(7). At the earliest possible date subject to the approval of and further order of this Court and the United States Court of Appeals for the 9th Circuit (to the extent

First Amended Order Granting Class Action Determination, Defining the Class, and Designating Counsel to the Class, August 6, 1974

that such an order may be necessary or appropriate) the aforesaid Counsel for the Class will prepare and send out a notice to all members of the class except those whose individual cases have already been filed with this Court or who have retained attorneys. With respect to such members of the class, service of said notice upon their attorneys of record in the filed actions or upon attorneys who have filed affidavits of formal representation will be sufficient, and

(8). This order may be altered or amended at any time upon motion, with proper showing as changes in circumstances or the interests of justice demand and sub-classes may be created.

(9). The defendants having requested that this order be certified for interlocutory appeal under 28 U. S. C. 1292(b), and it appearing to the Court that this order does not "involve a controlling question of law" and that an immediate appeal would not "materially advance the ultimate termination of the litigation," but would retard it, the said request by defendants is denied.

(10). This order does not prohibit the compromise and settlement of individual cases, whether a member of the class or not. Compromises will require the order of the Court and verbal showing by claimant and counsel that such compromise is fair and reasonable and shall show the proposed fees. If minors are involved, the petition must be accompanied by certified copies of the appropriate court approving it.

For good cause showing, it is so Ordered.

Dated: Aug. 5, 1974

s/ PEIRSON M. HALL
Sr. United States District Judge

Class Action Complaint.

(Aviation Wrongful Death, Survivial and Punitive Damages)

No. 74—808—PH

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UNITED STATES DISTRICT COURT,

CENTRAL DISTRICT OF CALIFORNIA.

GERALDINE L. FLANAGAN, Individually, and as heir of Claire Lux, deceased, and GERALDINE L. FLANAGAN and JOSEPH S. ISEMAN, as personal representatives and co-executors of the Estate of Claire Lux, deceased, on behalf of all heirs at law of said deceased, and on behalf of themselves and all others similarly situated,

Plaintiffs,

against

McDONNELL DOUGLAS CORPORATION and UNITED STATES OF AMERICA,

Defendants.

MAGDALEN WILCOX, Individually, as heir of Wayne Ayres Wilcox, deceased, and as grandparent of Shelley B. Wilcox and Spencer W. Wilcox, infants, and KENNETH M. KING, as personal representative and Executor of the Estate of Wayne Ayres Wilcox, deceased, on behalf of all heirs at law of said deceased and on behalf of herself and all others similarly situated,

Plaintiffs,

against

McDONNELL DOUGLAS CORPORATION and UNITED STATES OF AMERICA,

Defendants.

OUIDA NEILL, Individually, as heir of Ouida Neill Wilcox, deceased, and as grandparent of Shelley B. Wilcox and Spencer W. Wilcox, infants, and KENNETH M. KING, as personal representative and Executor of the Estate of Ouida Neill Wilcox, deceased, on behalf of all heirs at law of said deceased and on behalf of herself and all others similarly situated,

Plaintiffs,

against

McDONNELL DOUGLAS CORPORATION and UNITED STATES OF AMERICA,

Defendants.

MAGDALEN WILCOX and OUIDA NEILL, Individually, as heirs of Kailan A. Wilcox, deceased, and as grandparents of Shelley B. Wilcox and Spencer W. Wilcox, infants, and KENNETH M. KING, as personal representative and Administrator of the Estate of Kailan A. Wilcox, deceased, on behalf of all heirs at law of said deceased and on behalf of themselves and all others similarly situated,

Plaintiffs,

against

McDONNELL DOUGLAS CORPORATION and UNITED STATES OF AMERICA,

Defendants.

MAGDALEN WILCOX and OUIDA NEILL, Individually, as heirs of Clark N. Wilcox, deceased, and as grandparents of Shelley B. Wilcox and Spencer W. Wilcox, infants, and KENNETH M. KING, as personal representative and Administrator of the Estate of Clark N. Wilcox, deceased, on behalf of all heirs at law of said deceased and on behalf of themselves and all others similarly situated,

Plaintiffs,

against

McDONNELL DOUGLAS CORPORATION and UNITED STATES OF AMERICA,

Defendants.

Plaintiffs, by their attorneys, Morgan, Wensel & McNicholas, Kreindler & Kreindler and Paul, Weiss, Rif-

kind, Wharton & Garrison, complaining of the defendants respectfully allege:

JURISDICTION AND VENUE

1. Jurisdiction exists as against defendant McDonnell Douglas Corporation (hereinafter "Douglas") pursuant to:

(a) 28 U.S.C. §1332 in that plaintiffs Flanagan and Iseman are citizens of the State of New York, plaintiff King is a citizen of the State of New Jersey, plaintiff Wilcox is a citizen of the State of Indiana, plaintiff Neill is a citizen of the State of Texas, plaintiffs' decedents Claire Lux, Wayne Ayres Wilcox, Ouida Neill Wilcox, Kailan A. Wilcox and Clark N. Wilcox were citizens of the State of New York, defendant is a corporation duly organized under the laws of the State of Maryland with its principal place of business in the State of Missouri, none of the passengers or class members as hereinafter defined are citizens of the States of Maryland or Missouri, and the amount in controversy with respect to plaintiffs' claims and with respect to each of the claims of the class members on whose behalf plaintiffs sue herein exceeds $10,000, exclusive of interest and costs;

(b) 28 U.S.C. §1331 in that the action arises under the laws of the United States, including the Federal Aviation Act 49 U.S.C. §1301 *et seq.*, and the Federal Aviation Regulations, and the amount in controversy with respect to plaintiffs' claims, and with respect to each of the claims of the class members on whose behalf plaintiffs sue herein, exceeds $10,000, exclusive of interest and costs;

(c) 28 U.S.C. §1337 in that the action arises under Acts of Congress relating to commerce, including

the Federal Aviation Act 49 U.S.C. §1301 *et seq.* and the Federal Aviation Regulations; and

(d) principles of pendent jurisdiction.

2. Jurisdiction exists as against defendant United States of America (hereinafter "United States") pursuant to 28 U.S.C. §1346 *et seq.*, commonly referred to as the Federal Tort Claims Act. Plaintiffs recognize that under 28 U.S.C. 2675 a tort claim against the United States is usually presented to the appropriate federal agency and denied or constructively denied by said agency before action is started. Plaintiffs assert however that the substance of the activities complained of on the part of the Federal Aviation Administration is extraordinary, that Committees of both the United States Senate and House of Representaives are investigating those activities and have held public hearings thereon, and that it is desirable, in the interests of the class members, in the interest of the United States itself, and in the public interest, that the action against the United States be maintained at this time and that the United States appear and have an opportunity to participate and defend.

Plaintiffs have presented or shortly will present written claims to the Federal Aviation Administration on behalf of themselves and all class members. Based on past experience with claims arising out of aviation accidents, plaintiffs anticipate that these claims will be denied or that six months will elapse without their being acted upon.

3. Many of the acts and omissions of defendant United States, complained of herein occurred within the Central District of California.

4. At all times relevant hereto, plaintiff Iseman has been a resident of the State of New York, plaintiff Flanagan has been a permanent resident of the State of New York, temporarily residing in Oxford, England and the

plaintiffs' decedents were citizens and permanent residents of the State of New York, temporarily residing in England. Contemporaneous with the filing of this complaint, a substantially identical action will be commenced in the United States District Court for the Southern District of New York in order to avoid any question of proper venue with respect to the United States.

CLASS ACTION ALLEGATIONS

5. (a) This action is brought as a class action under F.R.C.P. Rule 23.

(b) The class, of which plaintiffs are members, consists of the next of kin, heirs and personal representatives of the 335 fare paying passengers who died as a result of the crash of a Turkish Airlines DC-10 aircraft (Registration "TC-JAV", hereinafter "the subject aircraft") on March 3, 1974 following take off from Orly Airport, Paris, France. As such, the class is so numerous that joinder of all members is impracticable.

(c) Plaintiffs have sustained a loss and are committed to prosecuting this action. Plaintiffs have retained competent counsel experienced in both aviation and class action litigation. Accordingly, plaintiffs will fairly and adequately protect the interests of the class.

(d) The common questions pertinent to all members of the class relate to:

(i) whether Douglas is liable to the class members for compensatory damages for negligence, breach of warranty, and/or strict tort liability in the design, manufacture, assembly, inspection, testing and sale of the subject aircraft and for failure to warn concerning the inherent defects in the subject aircraft;

(ii) whether Douglas is liable for punitive damages to the class as a whole as well as each of its members for its malicious, wilful, wanton and reckless conduct;

(iii) whether the United States is liable for negligence in certifying the subject aircraft despite knowledge of dangers and defects in it, and for failing to require Douglas to remove or correct said defects.

Plaintiffs' own claims with respect to the foregoing are identical to the claims of the other class members.

(e) The prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications on the question of liability in which event there would be established incompatible standards of conduct for the defendants. The maintenance of separate actions would also constitute a burden for the defendants as well as the individual plaintiffs. Additionally, it is possible, both as a practical and a legal matter that individual class members may not prosecute separate actions against these defendants due to the fact that the majority of class members are foreign nationals, as distinguished from plaintiffs herein who are citizens of the United States.

(f) A class action herein is superior to other available methods for the fair and efficient adjudication of the matters involved, particularly on the issues of liability of both defendants for compensatory damages and the liability of Douglas for punitive damages. Since liability for punitive damages depends on the defendant Douglas' degree of culpability and since the amount of the award must be directly related to that, to the defendant Douglas' ability to pay, and to a fair and proper amount of punishment, a class action provides the only way to make a single determination of culpability and render an appropriate award, or awards of damages. It is necessary for the protection of the defendant as well as the class members.

(g) Plaintiffs understand that actions seeking damages for wrongful death arising out of the subject crash have been commenced recently in this Court (*Hope v. McDonnell Douglas Corporation,* 74-698-AAH) and the United States District Court for the Eastern District of New York (*Kalinsky v. McDonnell Douglas,* 74-411). The *Hope* case is alleged as a class action. It does not join the United States as a defendant, nor does it seek punitive damages against Douglas. The plaintiff therein is an English domiciliary. No class motion has been filed therein.

(h) It is desirable to concentrate the litigation in this forum because the subject aircraft was designed, manufactured, assembled, inspected, tested and sold in this district, and many of the witnesses and documents relating thereto are located within this district.

(i) No difficulties are anticipated in prosecuting the case as a class action.

PARTIES

6. Plaintiff Geraldine L. Flanagan is the daughter and heir of Claire Lux, deceased. Plaintiffs Geraldine L. Flanagan and Joseph S. Iseman are the co-executors named in the Last Will and Testament of Claire Lux and expect formal appointment as such by the Surrogate's Court, Bronx County, New York. Plaintiff Magdalen Wilcox is the Mother of Wayne Ayres Wilcox and grandmother of Kailan A. Wilcox and Clark N. Wilcox. Plaintiff Ouida Neill is the Mother of Ouida Neill Wilcox and grandmother of Kailan A. Wilcox and Clark N. Wilcox. Plaintiff Kenneth M. King is the Executor named in the Last Will and Testament of Wayne Ayres Wilcox and of Ouida Neill Wilcox and expects formal appointment as such and as Administrator of the Estates of Kailan A. Wilcox and Clark N. Wilcox by the Surrogate's Court, Westchester County, New York.

7. At all times relevant hereto, Douglas' principal business was the design, manufacture, assembly, inspection, testing and sale of aircraft, including the subject aircraft.

8. At all times relevant hereto, the United States through its Department of Transportation, and more particularly the Federal Aviation Administration had certain responsibilities and obligations with respect to the safety and certification of aircraft.

FIRST CLAIM FOR RELIEF AGAINST BOTH DEFENDANTS FOR DECLARATORY RELIEF ON THE ISSUE OF THE LIABILTY OF BOTH DEFENDANTS

9. Prior to March 3, 1974, Douglas designed, manufactured, assembled, inspected, tested, sold and delivered the subject aircraft to Turkish Airlines for its use in carrying passengers for hire as an airline common carrier.

10. Prior to March 3, 1974, the United States through its Department of Transportation, and more particularly the Federal Aviation Administration, was charged by statute with the responsibility for certification of the subject aircraft, among others, to assure that its design, manufacture, assembly, inspection, testing and performance met certain minimum safety standards.

11. On March 3, 1974, said Claire Lux, Wayne A. Wilcox, Ouida Neill Wilcox, Kailan A. Wilcox and Clark N. Wilcox and the decedents (hereinafter "passengers") of all other class members were fare paying passengers aboard the subject aircraft, en route from Paris, France to London, England.

12. On March 3, 1974, the subject aircraft crashed after take off from Orly Airport, Paris, France, causing the deaths of all persons aboard.

13. Pursuant to 28 U.S.C. §2201, plaintiffs seek a declaration that the cause of the said crash was the fault of defendants, jointly and separately, and that defendants are liable therefore to plaintiffs and the other class members on whose behalf plaintiffs sue herein.

SECOND CLAIM FOR RELIEF AGAINST BOTH DEFENDANTS FOR DAMAGES BASED ON NEGLIGENCE

14. Plaintiffs repeat and reallege each allegation contained in paragraphs 1 through 12.

15. Said crash and the resulting deaths of the aforesaid passengers was caused by the negligence of the defendants, jointly and separately, through their officers, agents and employees, acting within the scope of employment, in the following respects:

(a) Douglas negligently designed, manufactured, assembled, inspected, tested and sold the subject aircraft in that, among other things

(i) it located control cables in the passenger cabin floor beams so that any buckling or failure of the floor could sever or jam said cables;

(ii) it failed to provide pressure relief vents, or blow out plates, in the cabin floor above the rear cargo compartment so that, in the event of a failure of the cargo door, or other loss of pressure from the rear cargo compartment, pressure could equalize without buckling the floor and severing or jamming the control cables;

(iii) it failed to provide a fail safe and fail proof latching and locking system for the rear cargo door despite the extreme danger inherent in unwanted opening of the door, in flight;

(iv) it failed to make recommended and specified changes in the closing and latching mechanism for the rear cargo door of the subject aircraft despite the fact that the aircraft was in the possession and control of Douglas at the time the said changes were specified; and

(v) it sold and delivered the subject aircraft to Turkish Airlines representing to said airline that the aircraft was up to date and fully modified with respect to the rear cargo door when in fact it was not.

(b) The United States, through its Federal Aviation Administration and its officers, agents and employees, separate and apart from negligence in the performance of discretionary functions, was negligent in that, among other things, it

(i) certified the subject aircraft without requiring Douglas to remove the aforesaid defects from the subject aircraft and/or warn the operator of the subject aircraft of the aforesaid defects;

(ii) failed to properly and adequately review the designs, drawings and tests of DC-10 aircraft, particularly with reference to (a) the location and vulnerability of control cables through the beams of the cabin floor; (b) the vulnerability of the rear cabin floor to sudden pressure differential with the consequent severing and jamming of control cables; and (c) the adequacy, inadequacy, reliability, and fail safe and fail proof quality of the closing, latching, locking and warning system of the rear cargo door; and

(iii) failed to require changes and improvements in the routing and isolation of control cables, the venting and pressure relief of the cabin floor, the closing, latching, locking, and warning system of the rear cargo door, when the need for such changes was ap-

parent, obvious, specifically called to the attention of the Federal Aviation Administration by the National Transportation Safety Board, and was recognized by the Federal Aviation Administration itself and employees of the Federal Aviation Administration themselves.

16. Each of the passengers whose death was caused by the crash of the subject aircraft were survived by class members who sustained pecuniary injuries, including loss of support, services, counsel, society, companionship, consortium, care, nurture, training, the prospect of inheritance of future accumulations, and other damages.

17. On March 3, 1974, during the flight and prior to and at the time of impact of the subject aircraft, each of the passengers aboard the subject aircraft suffered great physical pain and mental anguish in contemplation of impending disaster and death, personal injuries and property loss. As a result the estate of each of the passengers has sustained these and other damages.

18. By reason thereof, plaintiffs Flanagan and Iseman are entitled to recover damages in the sum of Three Hundred Twenty Five Thousand ($325,000) Dollars for the wrongful death of said Claire Lux and One Hundred and Seventy Five Thousand ($175,000) Dollars for survival damages for the Estate of said Claire Lux, plaintiffs Wilcox and King are entitled to recover damages in the sum of Two Million ($2,000,000) Dollars for the wrongful death of said Wayne A. Wilcox and One Million ($1,000,000) Dollars for survival damages for the Estate of said Wayne A. Wilcox, plaintiffs Neill and King are entitled to recover damages in the sum of One Million ($1,000,000) Dollars for the wrongful death of Ouida Neill Wilcox and Five Hundred Thousand ($500,000) Dollars for survival damages for the Estate of Ouida Neill Wilcox, plaintiffs Wilcox, Neill and King are entitled to recover Three Hundred Thousand

($300,000) Dollars for the wrongful death of said Kailan A. Wilcox and One Hundred Fifty Thousand ($150,000) Dollars for survival damages for the Estate of Kailan A. Wilcox, plaintiffs Wilcox, Neill and King are entitled to recover Three Hundred Thousand ($300,000) Dollars for the wrongful death of Clark N. Wilcox and One Hundred Fifty Thousand ($150,000) Dollars for survival damages for the Estate of said Clark N. Wilcox, and each of the class members on whose behalf plaintiffs sue herein has been similarly damaged in an amount not presently determinable, but in excess of the jurisdictional amount of $10,000 each.

THIRD CLAIM FOR RELIEF AGAINST DOUGLAS FOR PUNITIVE DAMAGES

19. Plaintiffs repeat and reallege each allegation contained in paragraphs 1 through 12, 16 and 17.

20. Douglas was guilty of malicious, wilful, and wanton conduct, and reckless disregard of the rights and safety of prospective passengers aboard DC-10 aircraft, in the following particulars, among others:

(a) Douglas knew from the time of the early design of the DC-10 that an extreme danger was presented by locating control cables in the beams of the passenger floor (which serves as both the floor of the passenger cabin and the roof of the cargo compartments) without providing adequate pressure relief venting between the passenger and cargo compartments. Douglas also knew that sudden loss of pressure from any one of the cargo compartments could cause the buckling and collapse of the floor with consequent severing or jamming of control cables.

(b) This knowledge and realization was reaffirmed during the static testing of the DC-10 when actual failure of the floor was experienced resulting from loss of pressure

in a cargo compartment forward of the rear cargo compartment.

(c) This knowledge and realization was further reaffirmed and evidenced by the incorporation of pressure relief vents, or blow out plates, in the cabin floor over cargo compartments forward of the rear cargo compartment.

(d) This knowledge and realization was further reaffirmed by an incident involving an American Airlines Douglas DC-10 on June 12, 1972 over Windsor, Ontario. In this incident the door of the rear cargo compartment opened in flight. The loss of pressure in the rear cargo compartment caused a pressure differential between the passenger cabin above and said cargo compartment, which in turn caused the floor to buckle and some of the control cables to be severed and others jam. Douglas participated in the investigation of this incident and was fully knowledgeable concerning its details.

(e) This knowledge and realization was further reaffirmed by recommendations of the National Transportation Safety Board following the aforesaid Windsor, Ontario, incident.

(f) At all the times herein mentioned, up to the time of the filing of this complaint, Douglas, despite knowledge of this danger and despite realization that it was extremely serious and could lead to the loss of life of all users of the DC-10 aircraft, including the passengers of the subject aircraft, did not incorporate pressure relief vents or blow out plates in the cabin floor over the rear cargo compartment of DC-10 aircraft, nor did it remove and isolate control cables from the beams of said floor, nor did it strengthen the floor itself.

(g) Following the said American Airlines incident over Windsor, Ontario, on June 12, 1972, and the investigation thereof, Douglas specified and recommended certain changes in the door closing, latching, locking, and warning

system of the rear cargo compartment door, none of which affected the basic problem created by the location of control cables in a floor which could collapse because of pressure differential.

(h) At the time said changes to the door closing, latching, locking, and warning system of the rear cargo compartment door were specified and recommended by Douglas the subject aircraft was in the possession and control of Douglas.

(i) Some of the said changes to the door closing, latching, locking and warning system of the rear cargo compartment door were made to the rear cargo compartment door of the subject aircraft but the most important change was not made, i. e. the closing mechanism still permitted the vent door to be closed without the cargo door itself being securely closed.

(j) Douglas sold and delivered the subject aircraft to Turkish Airlines. In so doing it represented to Turkish Airlines that all recommended and specified modifications to the door closing, latching, locking and warning system on the subject aircraft had been accomplished, when in fact the aforesaid most important of said modifications had not been accomplished.

21. By reason thereof, Douglas is liable for punitive damages to the class on whose behalf this action is brought in an aggregate sum of no less than $33.5 million, to be awarded to the class as a whole, and to be thereafter divided equally among the class members who represent each of the passengers, including plaintiffs herein, or in such proportions and amounts as to the Court seems just.

FOURTH CLAIM FOR RELIEF AGAINST DOUGLAS BASED ON STRICT LIABILITY

22. Plaintiffs repeat and reallege each allegation contained in paragraphs 1 through 12, 16 and 17.

23. Prior to March 3, 1974, Douglas designed, manufactured, assembled, inspected, tested, sold and delivered the subject aircraft in a manner to render the subject aircraft and components thereof defective and unsafe.

24. On March 3, 1974, plaintiffs' decedent and the other 334 passengers were aboard the subject aircraft while it was being operated for the use for which it was designed, manufactured, assembled and sold and in a manner reasonably foreseeable by Douglas.

25. Douglas' design, manufacture, assembly, inspection, testing and sale of the subject aircraft caused said defective and unsafe conditions and caused the death of plaintiffs' decedent and the other 334 passengers and the damages resulting therefrom.

26. By reason thereof, plaintiffs Flanagan and Iseman are entitled to recover damages in the sum of Three Hundred Twenty Five Thousand ($325,000) Dollars for the wrongful death of said Claire Lux and One Hundred and Seventy Five Thousand ($175,000) Dollars for survival damages for the Estate of said Claire Lux, plaintiffs Wilcox and King are entitled to recover damages in the sum of Two Million ($2,000,000) Dollars for the wrongful death of said Wayne A. Wilcox and One Million ($1,000,000) Dollars for survival damages for the Estate of said Wayne A. Wilcox, plaintiffs Neill and King are entitled to recover damages in the sum of One Million ($1,000,000) Dollars for the wrongful death of Ouida Neill Wilcox and Five Hundred Thousand ($500,000) Dollars for survival damages for the Estate of Ouida Neill Wilcox, plaintiffs Wilcox, Neill and King are entitled to recover Three Hundred Thousand ($300,000) Dollars for the wrongful death of said Kailan A. Wilcox and One Hundred Fifty Thousand ($150,000) Dollars for survival damages for the Estate of Kailan A. Wilcox, plaintiffs Wilcox, Neill and

King are entitled to recover Three Hundred Thousand ($300,000) Dollars for the wrongful death of Clark N. Wilcox and One Hundred Fifty Thousand ($150,000) Dollars for survival damages for the Estate of said Clark N. Wilcox, and each of the class members on whose behalf plaintiffs sue herein has been similarly damaged in an amount not presently determinable, but in excess of the jurisdictional amount of $10,000 each.

FIFTH CLAIM FOR RELIEF AGAINST DOUGLAS BASED ON BREACH OF WARRANTY

27. Plaintiffs repeat and reallege each allegation contained in paragraphs 1 through 12, 16 and 17.

28. Douglas expressly and/or impliedly warranted that the subject aircraft and its component parts were airworthy, of merchantable quality, and fit and safe for the purposes for which they were designed, manufactured, assembled, inspected, tested, sold, intended and used.

29. Douglas breached said warranties in that the subject aircraft and its component parts were not airworthy, of merchantable quality, or fit and safe for the purposes for which they were designed, manufactured, assembled, inspected, tested, sold, intended and used.

30. Said crash, the death of plaintiffs' decedent and the other 334 passengers and the damages resulting therefrom were caused by the breach of said warranties by Douglas.

31. By reason thereof, plaintiffs Flanagan and Iseman are entitled to recover damages in the sum of Three Hundred Twenty Five Thousand ($325,000) Dollars for the wrongful death of said Claire Lux and One Hundred and Seventy Five Thousand ($175,000) Dollars for survival damages for the Estate of said Claire Lux, plaintiffs Wil-

cox and King are entitled to recover damages in the sum of Two Million ($2,000,000) Dollars for the wrongful death of said Wayne A. Wilcox and One Million ($1,000,000) Dollars for survival damages for the Estate of said Wayne A. Wilcox, plaintiffs Neill and King are entitled to recover damages in the sum of One Million ($1,000,000) Dollars for the wrongful death of Ouida Neill Wilcox and Five Hundred Thousand ($500,000) Dollars for survival damages for the Estate of Ouida Neill Wilcox, plaintiffs Wilcox and King are entitled to recover Three Hundred Thousand ($300,000) Dollars for the wrongful death of said Kailan A. Wilcox and One Hundred Fifty Thousand ($150,000) Dollars for survival damages for the Estate of Kailan A. Wilcox, plaintiffs Wilcox, Neill and King are entitled to recover Three Hundred Thousand ($300,000) Dollars for the wrongful death of Clark N. Wilcox and One Hundred Fifty Thousand ($150,000) Dollars for survival damages for the Estate of said Clark A. Wilcox, and each of the class members on whose behalf plaintiffs sue herein has been similarly damaged in an amount not presently determinable, but in excess of the jurisdictional amount of $10,000 each.

WHEREFORE, plaintiffs demand judgment

(a) on the First Claim for Relief declaring that defendants are liable to plaintiffs and the class members on whose behalf plaintiffs sue herein for compensatory damages;

(b) on the Second Claim for Relief against both defendants in the sum of $500,000 arising out of the death of plaintiffs' Flanagan and Iseman's decedent Claire Lux, in the sum of $3,000,000 arising out of the death of plaintiffs Wilcox and King's decedent Wayne Ayres Wilcox, in the sum of $1,500,000 arising out of the death of plaintiffs Neill and King's decedent Ouida Neill Wilcox, in the sum of $450,000 arising out of the death of plaintiffs Wilcox, Neill and King's decedent Kailan A. Wilcox, in the sum of $450,000 arising out of the death of plaintiffs Wilcox, Neill and King's decedent Clark N. Wilcox, and for all other class members in an amount in excess of $10,000 each that will compensate each of such class members for the damages they have sustained;

(c) on the Third Claim for Relief against Douglas in the sum of at least $33.5 million awardable to the class as a whole as and for punitive damages;

(d) on the Fourth and Fifth Claims for Relief in the sum of $500,000 arising out of the death of plaintiffs' Flanagan and Iseman's decedent Claire Lux, in the sum of $3,000,000 arising out of the death of plaintiffs Wilcox and King's decedent Wayne Ayres Wilcox, in the sum of $1,500,000 arising out of the death of plaintiffs Neill and King's decedent Ouida Neill Wilcox, in the sum of $450,000 arising out of the death of plaintiffs Wilcox, Neill and King's decedent Kailan A. Wilcox, in the sum of $450,000 arising out of the death of plaintiffs Wilcox, Neill and King's decedent Clark N. Wilcox, and for all other class members in an amount in excess of $10,000 each, that will compensate each of such class members for the damages they have sustained;

together with costs, disbursements and interest.

Plaintiffs demand a trial by jury against defendant McDonnell Douglas Corporation.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-934

GERALDINE L. FLANAGAN, individually and as heir of Claire Lux, deceased, and on behalf of the heirs and next of kin of the passengers who died in the DC-10 Paris air crash of March 3, 1974, et al.,

Petitioner,

v.

McDONNELL DOUGLAS CORPORATION and the UNITED STATES OF AMERICA,

Respondents.

SUPPLEMENTAL PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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SUPPLEMENTAL PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Statement

On January 2, 1976 the Petitioner filed a Petition in this court praying that a writ of certiorari issue to review the writ of mandamus and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on May 28, 1975. This Supplemental Petition is filed to advise the court of matters unknown and unavailable to us at the time of the initial filing in accordance with Rule 24(5) of the Rules of the Supreme Court.

The "Questions Presented" as set forth in the Petition for a Writ of Certiorari remain unchanged.

Further Reason for Granting the Writ

***Petition of Gabel*, 350 F.Supp. 624 (C.D.Ca. 1972) referred to by the court below cannot constitute evidence of "repeated errors" to justify issuing a writ of mandamus. Gabel is now on appeal and has yet to be reviewed on its own record by any panel of judges of the Court of Appeals below.**

In its May 28, 1975 opinion and order [A6] the court below said:

> "We are also aware that the District Court has reached an identical decision in a prior case. *Petition of Gabel,* 350 F.Supp. 624, 630 (C.D.Ca.1972). Repeated errors of this magnitude in applying the Federal Rules of Civil Procedure may be corrected by mandamus."

Information obtained concerning the status of *Gabel* on appeal makes this condemnation of the district court below wholly unjustified. No appellate court has to date reviewed the record or heard argument in *Gabel;* consequently there has been no consideration of the class action determination therein in a manner consistent with the fairness and restraint expected in the appellate review process.

On February 23, 1972 Hon. Peirson M. Hall declared in *Gabel* that a class action could be maintained under F.R.Civ.P. Rule 23(a), 23(b)(1)(A) and (B) and (b)(2) to determine the liability of defendants for the deaths of 50 persons in a mid-air collision over Duarte, California on June 6, 1971. Individual actions brought previously had been consolidated for discovery purposes by the Judicial Panel for Multidistrict Litigation (MDL #106) in the Central District of California and were assigned to Judge Hall.

We have learned that between September 13, 1974 and July 2, 1975 twenty-five plaintiffs in *Gabel* filed appeals

in the Court of Appeals for the Ninth Circuit to challenge the District Court's award of fees to class counsel and underlying class action determination of February 23, 1972. [The appeals have been consolidated under docket #74-3283.] On September 15, 1975 the appellees in *Gabel* filed combined briefs stating their position.

As of January 13, 1976 no subsequent entries have been docketed in *Gabel.* The appeal has not been assigned to a panel for consideration nor is there any indication when that will occur and when oral argument will be set.

Obviously on August 6, 1974 when the class action order in *Flanagan* [A11] was signed *Gabel* had not been held to have been decided in error. In fact several district courts have cited *Gabel* with approval for the proposition that a class action may be maintained in appropriate mass accident cases. *Hernandez* v. *Motor Vessel Skyward,* 61 F.R.D. 558, 560 (S.D.Fla. 1973), aff'd on other grounds, 507 F.2d 1278 (5th Cir. 1975), *Harrigan* v. *United States,* 63 F.R.D. 402, 408 (E.D.Pa. 1974), *Yandle* v. *PPG Industries, Inc.,* 65 F.R.D. 566, 569 (E.D.Tex. 1974).

In this posture we respectfully submit that *Gabel* not only fails to demonstrate that Judge Hall was guilty of "repeated errors" in the application of Rule 23, but to the contrary that his application of Rule 23 to aviation mass disaster cases, in fact, was never rejected by any panel or the Court *en banc* in the Ninth Circuit. Furthermore, when the *Gabel* class action order was entered in February, 1972 no prior decision of the Court of Appeals below presented facts or issues comparable to those in *Gabel* and *Flanagan. LaMar* v. *H & B Novelty & Loan Co.,* 489 F.2d 461 (9th Cir. 1973), heavily relied upon by the court below, not only post-dates *Gabel,* but is so distinguishable on its facts as to be inapposite.

The January 13, 1976 status of the docket of the court below makes it clear that *Flanagan,* therefore, not *Gabel* constitutes the first formal appellate review in the Ninth

Circuit of the applicability of Rule 23 to an aviation mass disaster case. In the only other previous consideration of that issue of which we are aware *Stoddard* v. *Ling Temco Vought,* Civ. No. 72-1294 ALS (C.D.Ca. 1973), a petition for a writ of mandamus to vacate a class action determination was denied.

The parties in both *Gabel* and *Flanagan* are entitled to have their class action issues decided independently on their own records. Appellate review of *Gabel* may well result in a ruling that the class action determination therein was proper. The prerogatives of the panel of appellate judges which will hear *Gabel* should not be undermined by those who heard *Flanagan.* Nor should the Petitioner herein suffer comparison to parties, facts and issues as yet unsettled.

CONCLUSION

For these further reasons a Writ of Certiorari should issue to review the writ of mandamus and opinion of the Ninth Circuit.

Respectfully submitted,

LEE S. KREINDLER
WM. MARSHALL MORGAN
MARC S. MOLLER
Counsel for Petitioner

February 3, 1976

Service of the within and receipt of a copy thereof is hereby admitted this ..... day of January, A.D. 1976.

IN THE

Supreme Court of the United States

October Term, 1975
No. 75-934

GERALDINE L. FLANAGAN, individually and as heir of CLAIRE LUX, deceased, and on behalf of the heirs and next of kin of the passengers who died in the DC-10 Paris air crash of March 3, 1974, *et al.*,
Petitioner,

vs.

McDONNELL DOUGLAS CORPORATION and the UNITED STATES OF AMERICA,
Respondents.

Brief of Respondent McDonnell Douglas Corporation in Opposition to Petition for Certiorari.

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Respondents.

Brief of Respondent McDonnell Douglas Corporation in Opposition to Petition for Certiorari.

ARGUMENT.

The Petition presents two questions—(1) whether it was error for the court of appeals to vacate the class certification, and (2) whether the court of appeals abused its discretion in vacating the certification by writ of mandamus. Both are moot. Even if they were not moot, certiorari should be denied because there is no conflict in the circuits, the issue of class certification was correctly decided by the court of appeals, and the court of appeals did not abuse its discretion in issuing the writ of mandamus to correct an abuse of discretion by the district court.

I.
The Questions Presented Are Moot.

This litigation arises out of a crash of a Turkish Airlines DC-10 near Paris, France, on March 3, 1974, in which all 346 passengers and crew members were killed. On August 6, 1974, the United States District Court for the Central District of California filed its order certifying as a class "all heirs, beneficiaries, and personal representatives of the passengers aboard the aircraft." [Petition, A16 at ¶ (2).] The order also provided: "All cases heretofore or hereafter filed are hereby severed as to liability and damages and consolidated on the issue of liability." [*Id.*, A16.]

The order further provided that a plaintiffs' committee previously designated by the court, consisting of both counsel to the class and other plaintiffs' counsel "shall continue to function and shall be in overall charge of the liability phases of this consolidated litigation." [Petition, A17 at ¶ (4).] Finally the order also provided that members of the plaintiffs' committee "shall continue to maintain full and complete responsibility for the representation of their clients, . . ." [Petition, A17 at ¶ (4).] Thus, although a class was broadly certified to include all existing and potential plaintiffs, responsibility for representing individual plaintiffs remained with their independent counsel.

On July 16, 1974, when orally announcing its decision, the district court expressly permitted all plaintiffs' counsel to file additional actions on behalf of additional claimants:

> ". . . the lawyers who had the cases now would keep those cases and be responsible for them; that if they have retainers now, and they file cases later, they will be their cases.
>
> * * *
>
> That leaves you, Mr. Sterns, Mr. Butler [plaintiffs' counsel], free to roam the 18 Arabian countries, England and Japan—." [Reporter's Transcript, July 16, 1974, p. 47, lines 12-20; *see generally*, Appendix I.]

Since August 6, 1974, when the court filed its class certification order, the number of potential class members unrepresented by their own counsel has steadily dwindled as additional actions have been filed in the Central District of California seeking damages for the wrongful death of the Paris crash decedents. In all such cases plaintiffs have been represented by counsel.* At this time claims based upon the death of two passengers have been settled outside the United States and actions have been filed in the Central District of California accounting for the death of all 12 crew members and 325 of the 334 passengers aboard the plane, reducing the number of decedents unaccounted for to 7 passengers, none of whom were residents or citizens of the United States. [Affidavit of Joseph R. Austin, Appendix II.]

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*In an order filed by the district court on January 26, 1976, the court summarized:

> "The cases are in roughly four blocks, i.e., those represented by the Speiser-Butler [Speiser & Krause of New York and Butler, Jefferson & Fry of Los Angeles] group of law firms (approximately 160), those represented by the Kreindler-Morgan [Kreindler & Kreindler of New York and Morgan, Wenzel & McNicholas of Los Angeles] group of law firms (approximately 66), those represented by Walkup, Downing & Sterns [of San Francisco] (approximately 82), and those otherwise independently represented or by the attorneys for the crew." Order Fixing Date for Completion of Discovery, Setting Pre-Trial Date and Setting Trial Date—Liability Only—filed January 26, 1976, *In re Paris Air Crash of March 3, 1974*, MDL-172, United States District Court for the Central District of California, p. 2, fn. 2.

Whatever the situation may have been on August 6, 1974, when the district court made its original finding on numerosity, the unrepresented potential claimants are no longer "so numerous that joinder of all members is impracticable." Fed.R.Civ.P. 23(a)(1). Nor, since the district court has ordered the cases consolidated on liability and assigned non-class counsel as well as class counsel responsibility for liability issues, is class treatment "superior" to consolidation for resolution of liability issues. Fed.R.Civ.P. 23(b)(3).

In sum, the wrongful death actions filed before and after August 6, 1974, all of which are consolidated on the issues of liability, have mooted the class certification issue. All plaintiffs in those cases are represented by counsel, thereby reducing the potential size of the unrepresented class to any persons who might have claims based upon the deaths of seven passengers. Thus this mass disaster litigation is proceeding, on a consolidated basis, with nearly all potential claimants individually represented by counsel. To convert this litigation into a class action would serve no apparent purpose.

II.

There Is No Court of Appeals Decision in Conflict With the Decision of the Ninth Circuit That Rule 23 Does Not Permit Certification of a Class Whose Members Have Independent Damage Claims for Wrongful Death Arising Out of a Single Airplane Accident.

The Petition discloses no basis for the granting of certiorari. No conflict among the courts of appeals is asserted.* The Petition discloses only that some district courts have certified class actions in cases of multiple damage claims for personal injury or wrongful death arising out of a single incident, while others have not. [See Petition, pp. 10-14.]

In short, there is no conflict in the circuits and no "special and important reasons" for granting certiorari. Supreme Court Rule 19. We respectfully submit it will be time enough for the Court to review the class certification question if and when some other court of appeals renders a decision that conflicts with the decision of the Ninth Circuit below.

---

*The unpublished summary denial of a petition for a discretionary writ of mandamus [see Petition, pp. 10-11] does not create a conflict in decisions of the Ninth Circuit. Even if such a conflict did exist, such "internal difficulties" do not warrant certiorari. *Wiseniewski v. United States,* 353 U.S. 901, 902 (1957).

III.

It Is Within the Sound Discretion of the Court of Appeals to Issue Mandamus to Correct the District Court's Abuse of Discretion.

In issuing a writ of mandamus to correct the district court's abuse of discretion, the court of appeals properly exercised its discretion, independent of the process of appeal, to supervise the administration of justice within the circuit. See *Schlagenhauf v. Holder,* 379 U.S. 104, 109-113 (1964); *La Buy v. Howes Leather Co.,* 352 U.S. 249, 259-260 (1957).

The court of appeals held that "the certification in this case constitutes a clear abuse of discretion sufficient to invoke this extraordinary writ." [Petition, A6.] It found that the district court's certification was contrary to the Ninth Circuit's decision in *La Mar v. H. & B. Novelty & Loan Co.,* 489 F.2d 461 (9th Cir. 1973), and that the district court was following its own precedent, *Petition of Gabel,* 350 F.Supp. 624, 630 (C.D. Cal. 1972), rather than the rule of its own circuit. [Petition, A6-A7.] Such findings alone justified the issuance of the writ. *Will v. United States,* 389 U.S. 90, 96 (1967); *Schlagenhauf v. Holder, supra,* 379 U.S. at 110.

Moreover, the court of appeals held that the district court's interpretation and application of Rule 23 was "inconsistent with any tenable interpretation of Rule 23." [Petition, A6.] As the court of appeals correctly concluded, "Repeated errors of this magnitude in applying the Federal Rules of Civil Procedure may be corrected by mandamus." [Petition, A6-A7.] See *La Buy v. Howes Leather Co., supra,* 352 U.S. at 256.

Petitioner's contention that an abuse of discretion in certifying a class cannot be corrected by writ of mandamus seeks to create a unique sanctity for Rule 23 certifications. There is, however, nothing so sacrosanct about class certification as to insulate this single judicial action from the normal application of the All Writs Act, 28 U.S.C. § 1651(a).

Conclusion.

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

WILLIAM A. NORRIS,

Counsel for Respondent
McDonnell Douglas Corporation.

APPENDIX I.

Portions of the Reporter's Transcript of Proceedings on July 16, 1974.

THE COURT: Yes, Mr. Madole.

MR. MADOLE: Yes, Your Honor. I would like to get some clarification before this gets locked in.

First, I understood you to say to Mr. Kreindler that he was to be the, quote, representative of the class

on liability.

THE COURT: That's right.

MR. MADOLE: Does that mean that he is the only representative of the class?

THE COURT: No.

MR. MADOLE: Will the Court in fact follow the suggested recommendations for selection of class counsel, a class having been ordered?

THE COURT: I indicated that the committee of counsel already appointed will be appointed by the Court in this order to act as a committee of counsel in the class action.

MR. MADOLE: There may be a very positive built-in conflict there, Your Honor, if in fact members of the plaintiffs' committee who do not agree that a class action is in the best interest of their clients, may be forced to join with an application to the Ninth Circuit, for either writ of prohibition, which I understand is the only thing that is available. I am wondering, Your Honor, if --

THE COURT: No. A writ of prohibition in the class action?

MR. MADOLE: Yes, sir.

THE COURT: Well --

MR. MADOLE: The point I am asking about now, first, Your Honor, is whether or not their representation

can be explained further.

I understood Mr. Kreindler to ask whether or not he was to be a representative as to damages. A response that I heard was that he was a representative as to damages of cases that were filed after the date of the order; is that correct?

THE COURT: He is the representative of the damages to cases that are filed after the date of the order unless they're filed by somebody else. Sometime, either before that or after, someplace in these rambling remarks which I have made without notes, incidentally, I indicated that the lawyers who had the cases now would keep those cases and be responsible for them; that if they have retainers now, and they file cases later, they will be their cases.

MR. MADOLE: If they're retained later, Your Honor

THE COURT: If they're retained later, yes.

MR. MADOLE: That's still --

THE COURT: That leaves you, Mr. Sterns, Mr. Butler, free to roam the 18 Arabian countries, England and Japan --

MR. MADOLE: Your Honor, our problem is not roaming those countries. Our problem is that we have been working very diligently --

THE COURT: Figuratively roam.

MR. MADOLE: -- attempting to get these

deposition there. They were supposed to be there this morning.

Thank you.

APPENDIX II.

Affidavit of Joseph R. Austin.

State of California, County of Los Angeles—ss.

JOSEPH R. AUSTIN, being first duly sworn, states:

1. I am an attorney at law duly admitted to practice before this Court. I am one of the attorneys representing McDonnell Douglas Corporation ("MDC") in the numerous litigations arising out of the March 3, 1974, crash of a Turkish Airlines DC-10 near Paris, France. I am personally familiar with the facts stated hereinafter.

2. Ticket coupons surrendered by persons boarding the flight in question indicated that there were 334 passengers and 12 crew members aboard the aircraft at the time of the accident.

3. Counsel for MDC maintains a continuously updated list of the litigations commenced by counsel which make claims based on the deaths of persons aboard the plane which crashed. These records disclose that there are presently pending in the United States District Court for the Central District of California 347 actions commenced by representatives of persons killed in the accident. These include 5 actions which have been settled. They also include 10 duplicative actions; that is, 10 decedents have had two actions commenced on their behalf. All of these actions have been assigned to United States District Judge Peirson M. Hall. They represent litigations commenced on behalf of all 12 crew members and on behalf of 325 of the 334 passengers.

4. Claims based upon the deaths of two passengers, Mrs. A. Middleton and Mr. James McDonald, were settled outside the United States.

5. This leaves potential claims based upon the deaths of seven passengers unaccounted for in the pending litigation or otherwise unresolved. Counsel for MDC have attempted without complete success to ascertain the nationalities of these seven decedents. It is our belief that the citizenship of the majority of these passengers was United Kingdom. We are satisfied that none of the unaccounted for passengers was a citizen or resident of the United States.

JOSEPH R. AUSTIN

Subscribed and sworn to before me this 29th day of January, 1976.

DORIS S. HARALSON,
Notary Public in and for said County and State

No. 75-934

In the Supreme Court of the United States

OCTOBER TERM, 1975

GERALDINE L. FLANAGAN, ET AL., PETITIONERS

v.

McDONNELL DOUGLAS CORPORATION
AND
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners, certain plaintiffs in this tort suit arising out of the crash of an airliner, contend that the court of appeals erroneously issued a writ of mandamus ordering the district court to vacate its certification of their suit as a class action under Rule 23(b)(1)(A), (b)(1)(B), and (b)(2), Fed. R. Civ. P.

On March 3, 1974, a Turkish Airlines DC-10 aircraft crashed near Paris, France, resulting in the deaths of approximately 335 persons. Next-of-kin, survivors, and personal representatives of passengers instituted multiple actions in several districts, naming as defendants McDonnell Douglas (the plane's manufacturer), General Dynamics (the plane's designer), Turkish Airlines, and the United States. The plaintiffs alleged, *inter alia*, that

the United States was liable under the Federal Tort Claims Act for negligent certification of the aircraft by the Federal Aviation Administration. The Judicial Panel on Multi-District Litigation assigned the cases to the United States District Court for the Central District of California (Peirson Hall, J.) for consolidated pretrial proceedings pursuant to 28 U.S.C. 1407. *In re Air Crash Disaster at Paris, France, on March 3, 1974,* 376 F. Supp. 887. The district court subsequently transferred the actions to itself for all purposes pursuant to 28 U.S.C. 1404. In the course of the proceedings in the district court, the court indicated that it intended to send notice to next-of-kin and survivors of all passengers, inviting them to join in the suit. McDonnell Douglas and the United States thereupon filed petitions for a writ of mandamus and/or prohibition to bar issuance of the proposed notices; the court of appeals held that the district court could not issue the notices unless and until the action was properly certified as a class action. *Pan American World Airways, Inc.* v. *United States District Court for the Central District of California,* 523 F.2d 1073 (C.A. 9).

While that mandamus proceeding was pending, the district court entered an order certifying the suit as a class action pursuant to Rule 23(b)(1)(A), (b)(1)(B), and (b)(2), Fed. R. Civ. P. The United States and McDonnell Douglas then filed further petitions for a writ of mandamus challenging the propriety of that order, and also appealed from the order. The court of appeals consolidated the proceedings, granted the petitions for a writ of mandamus, vacated the class action certification, and dismissed the appeals as moot (Pet. App. A2-A7).[1]

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[1]A suggestion for rehearing *en banc* was rejected, three judges dissenting (Pet. App. A8-A10).

1. Petitioners mischaracterize the question presented as whether mass tort suits can ever be maintained as class actions under any provision of Rule 23 (see Pet. 9-14). In fact, the substantive question presented here is whether such suits can be maintained as class actions under subparagraphs (b)(1)(A), (b)(1)(B), or (b)(2) of that Rule, *i.e.*, as coercive class actions in which all prospective plaintiffs are forced to join, or only as permissible class actions under subparagraph (b)(3) of the Rule, which permits prospective plaintiffs to opt out of the suit in order to pursue separate remedies. The district court ordered a coercive class action. The court of appeals correctly ruled only that the subdivisions of Rule 23 allowing class actions of that kind do not "permit certifications of a class whose members have independent tort claims arising out of the same occurrence and whose representatives assert only liability for damages" (Pet. App. A3). In so holding, the court followed its earlier decision in *LaMar* v. *H&B Novelty & Loan Co.*, 489 F.2d 461 (C.A. 9). See also *Causey* v. *Pan American World Airways, Inc.*, 66 F.R.D. 392, 396-399 (E.D. Va.).

Four subdivisions of Rule 23(b) separately provide for the certification of class actions. The first, (b)(1)(A), applies if the failure to certify a class would create a risk of "inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class." The court of appeals correctly held that this provision does not apply to situations in which many plaintiffs seek individual money damages for separate injuries arising from a single accident. Variant determinations of liability or nonliability for tort damages with respect to such plaintiffs would not establish incompatible standards of conduct for the defendant. Such determinations would mean only that the defendant

would be required to pay damages to some plaintiffs but not to others. As the court of appeals correctly observed (Pet. App. A4):

> [A] judgment that defendants were liable to one plaintiff would not require action inconsistent with a judgment that they were not liable to another plaintiff. By paying the first judgment, defendants could act consistently with both judgments.

The second subdivision, (b)(1)(B), applies to suits that either would be dispositive of the interests of class members not parties to the litigation or would substantially impair or impede such members' ability to protect their interests. As the court of appeals correctly determined, that provision is plainly inapplicable here (Pet. App. A5):

> [C]lass actions are permitted under subdivision (b)(1)(B) only if separate actions "inescapably will alter the substance of the rights of others having similar claims." * * * At worst, individual actions would leave unnamed members of the class with the same complexity and expense as if no prior actions had been brought.

The third subdivision, (b)(2), applies when one party's conduct justifies "appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." This provision by its terms is inapplicable to ordinary tort claims for money damages. Its language cannot be avoided by pleading such claims in the form of a request for a declaration of liability in tort: Rule 23(b)(2) allows class actions for declaratory relief only if that relief corresponds to final injunctive relief, which a declaration of tort liability does not.

For present purposes, the most significant aspect of the foregoing subdivisions of Rule 23 is that they provide no procedure by which a class member who does not wish to be bound by the judgment may opt out of the proceeding. In effect, considerations of equity resulting from the risk of incompatible standards or prejudice to other class members are deemed to outweigh any individual's desire to pursue his own course. In contrast, class actions permitted by the fourth subdivision, (b)(3), which applies generally to all litigation in which "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and * * * a class action is superior to other available methods for the fair and efficient adjudication of the controversy," are subject to procedures for notification to class members that they may either exclude themselves from the class, or appear through their own counsel (Rule 23(c)(2)). Subdivision (b)(3) has not been invoked by the plaintiffs in this case, and therefore the question whether it would be applicable here[2] is not before the Court.

In this case, the district court, by certifying the class under Rule 23(b)(1) and (2), effectively barred nonparties with claims against the defendants from opting out of the litigation in order to pursue their remedies where and when they see fit. See *Air Line Stewards and Stewardesses Association, Local 550* v. *American Airlines, Inc.*, 490 F.2d 636 (C.A. 7) certiorari denied, 416 U.S. 993. As the court of appeals correctly held, this is "inconsistent with any tenable interpretation of Rule 23"

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[2]See Advisory Committee's Note to Rule 23(b)(3) of the Proposed Rules of Civil Procedure, 39 F.R.D. 69, 103.

(Pet. App. A6). Petitioners have been unable to cite any appellate decision or commentator to the contrary.[3]

2. Petitioners further argue (Pet. 14-18) that even if the district court's actions were "a clear abuse of discretion" and "inconsistent with any tenable interpretation of Rule 23," the court of appeals misconstrued the All Writs Act, 28 U.S.C. 1651(a), and Rule 23 in proceeding by mandamus. Contrary to petitioners' suggestion, however, the court of appeals did not hold that class certifications are reviewable by extraordinary writ as a matter of course. Instead, the court recognized the rule, accepted also by the Second and Third Circuits, that mandamus is not ordinarily available to review class certifications (Pet. App. A6). But the court determined that mandamus was uniquely appropriate here as an exercise of its supervisory power over the administration of justice in the district courts, in view of the fact that in certifying the class the district court had ignored directly contrary Ninth Circuit precedent (*ibid.*). This application of the All Writs Act is consistent with the prior decisions of this Court. See, *e.g.*, *Thermtron Products, Inc.* v. *Hermansdorfer*, No. 74-206, decided January 20, 1976, slip op. 16-17; *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, 255-260.

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[3]Petitioners' reliance (Pet. 12) on the views of Professor Moore, and Professors Wright and Miller, is misplaced, since both treatises endorse class actions in tort only under Rule 23(b)(3). See 3B Moore's *Federal Practice*, para. 23.45[3] at p. 23-811, n. 35 (2d ed. 1975); 7A Wright & Miller, *Federal Practice and Procedure*, §1783 at p. 117 (1972 ed.).

The only two reported cases cited by petitioners which have held that a Rule 23(b)(1) or (b)(2) class action is proper in a tort suit are the district court decisions in *Petition of Gabel*, 350 F. Supp. 624 (C.D. Calif.) (Hall, J.), and *Hernandez* v. *Motor Vessel Skyward*, 61 F.R.D. 558 (S.D. Fla.), both of which have been criticized by commentators. See 3B Moore's *Federal Practice*, paras. 23.35 and 23.40 at pp. 71-74, 76, 85 (1974 Cum. Supp.).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1976.